

# A Prime Minister in Hospital: the Constitutional Implications

---

Jeff King

2020-04-08T11:33:31

Following the news that the British Prime Minister, Boris Johnson, has been taken to hospital for treatment for COVID-19, there has been much discussion about what should happen if he should die or become incapacitated. Who would take over and how would such a successor be chosen? What is the role of Dominic Raab, the Foreign Secretary, who has been designated to deputise for him in his absence? And how do we find the answers to the above questions, given the UK has no codified Constitution to consult?

## The crucial role of constitutional conventions

The UK's constitution is made up of a mixture of statute law, common law principles, prerogative powers of the Crown and binding constitutional conventions – that is, non-legal norms governing the behaviour of constitutional actors. Such conventions – which are not enforceable in courts of law, but govern crucial areas of the constitution – are particularly important in this context. The closest thing the UK has to any 'code' setting out in one place the core rules of the constitution is [The Cabinet Manual](#), which is issued by the UK Government. First published by the Cabinet Office in 2010, it has no formal constitutional status, but is a useful source to consult. Where we rely below on its formulations of constitutional rules, we believe these are reasonably uncontroversial.

The first point to note is that the office of Prime Minister is itself largely a creature of convention. It is not provided for by statute and neither is it regulated anywhere by statute, although it is mentioned from time to time – for example in the mandatory statutory requirement last year for the Prime Minister to send a letter to the EU seeking an extension to the Article 50 deadline. The Cabinet Manual states (at para 1.13) that

'The Prime Minister is the Sovereign's principal adviser, chairs Cabinet and has overall responsibility for the organisation of government. Cabinet is the ultimate arbiter of all government policy; decisions made at Cabinet and Cabinet committee level are binding on all members of the Government...'

Crucially, the Prime Minister has power to appoint and dismiss all other Ministers.

## The appointment of a Prime Minister

The question of who would take over in the event of death or illness of a Prime Minister is not explicitly governed by any constitutional rules, whether in the Cabinet Manual or elsewhere. Hence, we must apply the existing rules and conventions on

appointments and resignations to the situation where a Prime Minister dies in office or is incapacitated by illness.

How does a person become Prime Minister? The answer in law is that, to become PM, one must be appointed to that position by the Queen, exercising the royal prerogative. Once appointed, a PM holds office until they resign, die, or (which has not happened for a very long time) are dismissed by the Queen. Of course, in a democracy it would be wholly unacceptable for a hereditary Monarch to be able to choose whomever she pleased to be Prime Minister; hence the Queen is directed by binding constitutional convention as to whom she must appoint. Similarly, convention dictates when a sitting Prime Minister must resign.

The primary convention governing the *appointment* of a Prime Minister is that the Queen must appoint the person best placed to command a majority in the House of Commons. As now, that nearly always means the leader of the political party that has a majority of MPs in the Commons, currently the Conservative Party, which has a majority of 87. Once appointed, a Prime Minister forms a Government, and continues in office. Nearly always, their tenure comes to an end through resignation. Prime Ministers resign when they lose their Commons majority, usually through defeat in a General Election. However, a PM may choose to resign because of a major policy defeat (e.g. David Cameron after calling, and losing, the referendum on the UK's membership of the EU in 2016) or after losing the confidence of her senior Ministers and her party (e.g. Theresa May, 2019; Margaret Thatcher, 1990).

## **There must always be a Prime Minister**

It is generally agreed that there must always be a Prime Minister, not least for reasons of national security. Hence if a Prime Minister wishes to resign – or it looks as if they are likely shortly to die or become incapacitated long-term – a successor should be agreed by the Cabinet so that they can be appointed by the Queen to take over immediately.

Such a successor would then become Prime Minister at least for an interim period; they would remain PM until the governing party had held a leadership election (below). The winner of that election would then be appointed as Prime Minister by the Queen – unless that person was already the interim PM, in which case they would simply remain in office, now bolstered by the unquestioned support of their party.

Finally, it should be noted that there is occasionally an office of Deputy Prime Minister. That title is sometimes given to a senior member of the Cabinet, and has been used, for instance, to appoint the leader of the junior party in a Coalition to a senior cabinet post (Cabinet Manual, para 3.11). The Cabinet Manual makes clear that 'The fact that a person has the title of Deputy Prime Minister does not constrain the Sovereign's power to appoint a successor to a Prime Minister.' This is because of the above convention that the Queen *must* appoint as Prime Minister the person best placed to command the confidence of the Commons, which is something a junior coalition partner would rarely be in a position to do.

## Applying these principles to the current situation

There are two distinct issues at the current time. First, what is the position of Dominic Raab, who is currently deputising for Boris Johnson? Raab's formal title is First Secretary of State, which means he is the most senior minister after the Prime Minister. He is not 'Deputy Prime Minister', but has been asked temporarily to perform some, but not all of the roles of the Prime Minister in his absence. Thus, he is chairing the Cabinet and, if necessary, the National Security Council, and acting as the most senior Minister on active duty. However, he has *not* been given the key Prime Ministerial power of [dismissing or appointing Ministers](#), and nor will he have [a weekly audience with the Queen](#). It is likely that Raab will not seek to initiate any major changes in government policy while he is deputising for Johnson. Should Raab in turn become ill, the next in line is the current Chancellor, Rishi Sunak, and after him, the Home Secretary, Priti Patel. The order of precedence is normally taken as the order in which Ministers are listed on the [10 Downing St website](#).

The second issue that arises is what happens if Boris Johnson either dies in office or remains ill for such a long period that it is thought necessary to formally replace him as Prime Minister?

The answer, as noted above, is that a successor must be agreed who can be appointed by the Queen to act as Prime Minister for an interim period, until the Conservative Party can hold a leadership election. The winner of that election would then become the next 'long-term' PM. The only *constitutional* rule in play is the one noted above – that, to be appointed, the person must be best placed to command the confidence of the Commons. In practice, the Cabinet – perhaps quickly consulting the '1922' Committee, which represents backbench Conservative MPs – would agree on a name to be communicated to the Palace as the person to be appointed as a Prime Minister on an interim basis. Almost certainly that would be one of the current Cabinet; probably, but not inevitably, Dominic Raab.

## What constraints would apply to such a successor?

Once appointed, given that person is likely to be Prime Minister for only an interim period, are they under any *constitutional* constraints upon their freedom of action? The answer, perhaps surprisingly, appears to be 'no'. There *are* constitutional limitations upon Prime Ministers who are 'on the way out'; these are known as 'the caretaker convention' and are summarised in paras 2.27 and 2.29 of the Cabinet Manual. Essentially the convention is that such a PM should not initiate any major policy changes, enter into long-term commitments or make major public appointments. However, this convention *only* applies to Prime Ministers who have lost the confidence of the Commons – it reflects the fact that they have lost their legitimacy to govern and will shortly be replaced.

This happens in two circumstances. First, where a Prime Minister has lost a General Election, but continues as Prime Minister until a new Government can

be formed (which may take a few weeks if it is necessary to form a Coalition or 'confidence and supply' arrangement between two or more political parties). This was the position of Gordon Brown after Labour lost the 2010 General Election, until the new Prime Minister, David Cameron, was appointed. The caretaker convention applies to the period after the election result, up until the formation of the new Government and appointment of its leader as Prime Minister by the Queen. The second relevant situation is where a Prime Minister has lost a motion of no confidence in the Commons. Here, the caretaker convention applies to the period following the passing of the motion of no confidence until a new Government is formed, which will normally happen following the General Election [triggered by the successful no confidence motion](#). This last happened in 1979 and resulted in Margaret Thatcher becoming Prime Minister.

Since in this case, the new, interim Prime Minister would *not* have lost the confidence of the Commons, the caretaker convention would not appear to apply.

Some might argue that some analogous principle should apply, given that the PM would have been chosen quickly and through a truncated procedure and hence in some circumstances it might be doubtful that he or she had the confidence of their party or the Commons. But in this case, given the large Government majority, that question would seem unlikely to arise. It follows that a Prime Minister appointed for the interim period would not be subject to any clear *constitutional* constraints on their freedom of action. However, as someone appointed only until the party chooses a new leader, it is likely that they would regard themselves as being subject to strong *political* constraints that would likely amount to much the same thing in practice.

## A party leadership election

Should Boris Johnson have to be replaced as PM, the issue of who is best placed to lead the Conservative Party – and hence be PM long-term – can only be determined by the Party itself. Hence the next step would be for the Conservative Party to call a [party leadership election](#). The rules and processes for such a contest are governed by the Party's own constitutional rules. Should it become necessary, such a leadership election can be held fairly quickly. It is normal for the party membership as a whole to vote on the final choice; however, this will not happen where – following the rounds of voting by Conservative MPs – there is no choice for the wider membership to make because only one candidate remains. For example, after the EU referendum result, Prime Minister David Cameron resigned as party leader by announcing his intention to do so on 24 June 2016. The leadership contest opened on 30 June 2016, and after a few early rounds of voting, Theresa May MP emerged as the only tenable candidate after the last candidate opposing her withdrew. On 11 July 2016, she was acclaimed the new party leader. Hence the whole process took less than 3 weeks. If, on the other hand, two or more candidates remain in the contest after Conservative MPs have voted, then these names will go out to the nationwide party membership. The rules appear to have enough flexibility to allow much of this to be done online, if necessary.

While the above position may appear odd, the process of deciding upon the new Prime Minister would be reasonably democratic. Any person appointed to that post

would in theory be subject to a motion of no confidence in the House of Commons. This means that the governing party would have to find a way of agreeing quickly upon an interim Prime Minister and – via its formal leadership election procedures – upon a permanent replacement, if needed. Provided the governing party agreed upon the person to be appointed, the new Prime Minister would be assured of comfortably winning any such vote in the House of Commons; hence it is unlikely that any such vote would take place.

*The authors would like to thank Robert Craig for his valuable comments and suggestions.*

